Question Presented: If the Commission were to adopt the processing guideline proposed by the Coalition and broadcasters challenged the processing guideline as violating their First Amendment right to free speech, how would a court likely rule?

Short Answer: The court would uphold the FCC's decision to use a processing guideline.

Analysis: Although there is no court decision directly addressing the constitutionality of FCC processing guidelines, the FCC used formal processing guidelines to assess all radio and television license renewals from the early 1970s to the early 1980s.[1] Under these guidelines, AM radio stations that aired 8% non-entertainment programming and FM stations that aired 6% non-entertainment programming (defined as news, public affairs and all other non-entertainment programs) would have their licensees renewed by the FCC staff pursuant to delegated authority. *Deregulation of Radio,* 84 FCC 2d 968, 975 (1981). Television stations needed to have 5% local programming, 5% news and public affairs programming, and 10% total non-entertainment programming to be renewed by the staff. *TV Deregulation Order*, 98 FCC 2d at 1078. A separate guideline was used to assess whether stations were broadcasting excessive commercial content. For television stations, for example, the staff generally could not renew stations that proposed to air more than 16 minutes of commercial matter per hour. *TV Deregulation Order*, 98 FCC 2d at 1102.

These processing guidelines were never challenged in court as being unconstitutional. The FCC repealed them because it concluded that even "absent these

[1] Prior to 1973, informal guidance to the staff served a similar function. *See, e.g., The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076, 1078 (1984) ("*TV Deregulation Order*").

guidelines significant amount of non-entertainment programming of a variety of types will continue on radio." *Deregulation of Radio*, 84 FCC 2d at 977; see also *TV Deregulation Order*, 98 FCC 2d at 1080 ("our review of the record and study of station performance persuades us that licensees will continue to supply informational, local and non-entertainment programming in response to existing as well as future marketplace incentives, thus obviating the need for the existing guidelines").

The Commission stressed its belief that market forces would ensure the continued provision of news programs on radio; moreover, "[w]e do expect, and will require, radio broadcasters to be responsive to the issues facing their community." *Deregulation of Radio*, 84 FCC 2d at 978. In deregulating television, the Commission emphasized that it was retaining the "obligation of licensees to provide programming that responds to issues of concern to the community." *TV Deregulation Order*, 98 FCC 2d at 1077. Similarly, the Commission concluded that the commercial limits were not necessary because market forces would limit the amount of commercial matter. *Deregulation of Radio*, 84 FCC 2d at 1008; *TV Deregulation Order*, 98 FCC 2d at 1102-03.

In 1996, the FCC adopted a similar processing guideline, which is still in use today, to assess whether television stations are adequately serving the educational and informational needs of children. *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd 10,660 (1996). In adopting this guideline, the FCC considered at length whether the processing guideline would violate First Amendment, and concluded that it did not. *Id*. at 10,728-33. The constitutionality of this guideline was never challenged in court.

In analyzing the constitutionality of the children's processing guideline, the Commission began by discussing the relevant Supreme Court precedents. It noted that "[i]t does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." *Id.* at 10,729 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969)). Further, "a licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *Id*. at 10,729 (quoting *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (internal quote omitted)). The Commission also observed that in *Turner Broadcasting v. FCC*, the Court made clear that the Commission has the authority to "inquire of licensees what they have done to determine the needs of the community they propose to serve" and that "broadcast programming, unlike cable programming, is subject to certain limited content restraints imposed by statute and FCC regulation." *Id*. at 10,730 (citing *Turner*).

Applying these standards, the Commission found that its new regulations were constitutional under the "traditional First Amendment standard" applied to broadcasting. Specifically, it found that the new rules imposed

> reasonable, viewpoint-neutral conditions on a broadcaster's free use of the public airwaves. They do not censor or foreclose speech of any kind. They do not tell licensees what topics they must address. They only provide that broadcasters report the educational objective of the program and the expected educational effects.

Id. at 10,730.

Moreover, the Commission found the rules would pass constitutional muster even if evaluated under a "heightened standard" because they directly advance the government's substantial interest in educating children and are no more burdensome than

necessary to ensure that children will be able to watch educational and informational programming. It found:

> our regulations require broadcasters to air children's educational and informational programming, but do not "exclude any programming that does in fact serve the educational and informational needs of children; rather the broadcaster has discretion to meet its public service obligation in the way it deems best suited." Specifically, the processing guideline ... does not limit this discretion. It provides a means by which a broadcaster can be certain that our staff will be in a position to process its renewal application without further review of the broadcaster's CTA efforts.

Id. at 10,732.

Under the same analysis, the processing guideline proposed by the Coalition is constitutional. As with the children's guideline, courts should apply the traditional test for analyzing regulations of broadcasting, which is the rational basis, or reasonableness test.[2] Under this test, the guideline easily passes muster.

The FCC, the agency charged with granting and renewing broadcast licenses only where such grant or renewal is in "public interest" can establish what is in the "public interest" either on a case-by-case basis or through rulemaking. The proposed processing guideline addresses three issues, each of which as traditionally been considered to be an important aspect of the public interest–ensuring adequate local civic and electoral

[2] The Supreme Court has repeatedly made clear that broadcasting is subject to a different standard of review under the First Amendment than other types of media. *See, e.g.*, *National Broad. Co., Inc. v. United States*, 319 U.S. 190, 226 (1943); *CBS, Inc. v. FCC*, 453 U.S. 367, 394-95 (1981); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 799 (1978). This is because broadcast spectrum is a scarce, publicly-owned resource, and many more people would like to broadcast than can be accommodated. The Communications Act established a regulatory regime in which licenses are required to broadcast, and grant of licenses is conditioned on serving the public interest. Because not everyone who wants a license can have one, nobody has a First Amendment right to a license. Consequently, a licensee may constitutionally be required "to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Red Lion*, 395 U.S. at 389.

programming, promoting diversity through ensuring the public has access to independently produced programming, and prohibiting excessive commercial programming.

The processing guideline represents a reasonable, viewpoint neutral method of achieving the Commission's public interest goals. It does not censor or foreclose speech of any kind, nor does it tell licensees what topics they must address. The use of guidelines makes it easy for licensees to demonstrate that they have met their public interest obligations. Processing guidelines are superior to a case-by-case approach because they provide greater certainty to broadcasters. At the same time, they are less intrusive than a rule requiring a specific quantity of local civic and electoral programming, a minimum percentage of independently produced programming, or a strict limit on commercial matter. The processing guidelines allow broadcasters the flexibility to serve the public interest by other means.

Even under heightened scrutiny, the proposed guideline would pass constitutional muster. The guideline that licensees air a minimum of three hours per week of qualifying local civic or electoral affairs programming on their most-watched channel and three hours or three percent of the aggregate number of hours broadcast between the hours of 7 a.m. and 11:35 p.m. per week, whichever is less, on other channels, furthers the "First Amendment goal of producing an informed public capable of conducting its own affairs." *Red Lion,* 395 U.S. at 392. As the Supreme Court recognized in *Farmers Educ. & Co-op. Union v. WDAY,* 360 U.S. 525, 529 (1959), Congress recognized "radio's potential importance of a medium of communication of political ideas." *See also Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (recognizing "it is of particular importance that candidates have

the ... opportunity to make their views known so that the electorate may intelligently evaluate and candidates' personal qualities and their positions on vital public issues before choosing among them on election day.") These guidelines also further the important goal of serving local communities.

At the same time, the guideline is narrowly drawn to serve these objectives based on what studies show to be the real problems. Studies submitted to the Media Bureau by the Coalition show that television stations have been providing little or no coverage of local and state political races. For example, a 2002 study by the Lear Center at the University of Southern California's Annenberg School found that the majority of local news broadcasts that aired in the weeks leading up to Election Day contained no campaign coverage at all. This proposal is carefully crafted to allow broadcasters to retain editorial discretion while also ensuring that the public receives a modicum of local civic and electoral affairs programs at the times people are likely to be watching and especially when needed prior to elections.

The guideline that network affiliates air independently produced programming for at least 25 percent of the primary channel's prime time schedule is designed to promote public access to diverse programming. The government has a long standing interest in ensuring that the public has access to diverse sources of programming. Indeed, "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red Lion*, 395 U.S. at 390. The FCC clearly has the authority to "carve out a portion of the production and distribution markets" for independent producers to promote "a greater variety of perspectives." *Schurz Communications, Inc. v. FCC,* 982 F.2d 1043, 1049 (7th Cir. 1992).

Media consolidation over the past several years has resulted in a situation where five media conglomerates control approximately 75% of broadcast and cable prime-time viewing. Moreover, these same five conglomerates also produce the vast majority of programming for television. Of the 40 new series aired on the four major broadcast networks in the 2002 season, 77.5% were owned in whole or in part by one of the four major networks, compared to 56.3% in 2001 and 12.5% in 1990. Research documents instances where networks have favored their own programs over superior, independently-produced programming.

The proposed guideline is narrowly drawn to afford licensees editorial discretion while promoting the free speech rights of independent producers as well as the public's right to diverse programming. The guideline is limited both in when it applies (prime time only) and the amount of time (25%). Network affiliates that do not meet the guideline would have the opportunity to show that they provided diverse programming to the public through other means, for example, by scheduling significant amounts of independently-produced programming at other time.

The guideline that the staff shall refer to the Commission any application showing that the licensee has devoted in excess of 50% of its daily programming to sales presentations or program length commercials also serves a substantial governmental interest in making sure that the public airwaves are used to serve the public interest, rather than the private interests of station owners and advertisers. In upholding the FCC's decision to repeal its previous processing guideline for excessive commercialization, the Court of Appeals noted:

> In the past this court has expressed its concern about excessive commercialization—a concern mirrored in the Commission's own long-

> standing policies against domination of scarce broadcast time by private advertiser interests. The Commission may well find that market forces alone will not sufficiently limit over-commercialization. In that event, we trust the Commission will be true to its word and will revisit the area in a future rulemaking proceeding.

UCC v. FCC, 707 F.2d 1414, 1438 (D.C. Cir. 1986) (footnote and citations omitted).

Ample evidence shows that market forces have not sufficiently limited over-commercialization. Indeed, Congress directed the FCC to determine whether stations primarily devoted to homeshopping were operating in the public interest. 47 U.S.C. § 534(g)(2).

The proposed guideline is narrowly drawn. It does not prohibit a station from airing substantial amounts of homeshopping, infomericals and other commercial content. If does, however, ensure that such stations are used for other purposes, such as informing, educating and entertaining the public, thus again, promoting the public's right to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.

In sum, whether the processing guideline proposed by the Coalition is subject to the traditional, rational basis review afford broadcast regulation, or a heightened standard of review, it will be found consistent with the First Amendment.